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No. 96-98

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

K MART CORPORATION,
Petitioner,
v.
CARL HELTON, CHARLES W. KEMPTON, NICK PAYNE, JAMES E. TAYLOR, BOB WILLIAMS, and DAVID JACK WRIGHT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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August 16, 1996

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MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37 of the Rules of this Court, the Equal Employment Advisory Council (EEAC) and the Chamber of Commerce of the United States of America (the Chamber) respectfully move this Court for leave to file the accompanying brief *amici curiae* in support of K Mart Corporation, Petitioner, whose written consent has been provided to the Clerk of the Court.

Counsel for Respondents, Daniel Klein, after being asked, has not consented. Because all parties have not consented, a motion to file this brief is required.

In support of this motion, EEAC and the Chamber, by the following, show that their brief brings relevant matters to the attention of this Court that have not been presented by the parties.

1. EEAC is a voluntary association of employers organized to promote sound approaches to the elimination of employment discrimination. Its membership includes nearly 300 major U.S. corporations, as well as several associations which themselves have hundreds of corporate members. EEAC has a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

2. The Chamber of Commerce of the United States of America ("the Chamber") is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents approximately 215,000 businesses and organizations and serves as the principal voice of the American business community.

3. A significant aspect of the Chamber's activities is the representation of the interests of its member-employers in employment and labor relations matters before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government.

4. The members of EEAC and the Chamber are employers subject to the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*, (ADEA) as well as other employment laws and regulations. Due to changing business circumstances in recent years, many companies that are members of EEAC and the Chamber have had to implement reductions in force affecting substantial numbers of employees, or, like the employer in this case, have had to institute performance-based demotions in order to remain a viable business. As a result, many have faced litigation of the sort that frequently arises from large-scale workforce reductions or demotions, including discrimination charges and lawsuits filed under the ADEA. Thus, EEAC and the Chamber have an interest in the procedures under which ADEA cases are litigated.

5. In the instant case, the Eleventh Circuit adopted a new, permissive interpretation of the "similarly situated" requirement for use of the representative class action procedure permitted under the ADEA. This new standard would make the ADEA's representative action procedure available to challenge virtually every corporate workforce reduction, even where the individual plaintiffs' claims involve widely disparate factual situations and require particular, different and sometimes unique defenses. The members of EEAC and the Chamber are concerned that such a liberal interpretation would lead to insurmountable complications in the management and trial of ADEA cases and ultimately would deprive employers of due process, particularly for large, national corporations.

6. The issues presented in this appeal, therefore, are extremely important to the nationwide employer

constituency that belongs to EEAC and the Chamber. Because of its interest in such issues, EEAC has filed *amicus curiae* briefs in a number of other cases involving procedures and standards under the ADEA and other statutes. *E.g., Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989) (scope of federal court's discretion to facilitate notice to potential plaintiffs in representative class actions under ADEA); *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993) (definition of "willful" violation under ADEA); *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982) (proper class representative under Title VII); *Tolliver v. Xerox Corp.*, 918 F.2d 1052 (2d Cir. 1990), *cert. denied*, 499 U.S. 983 (1991) (right of would-be plaintiffs who have not filed timely ADEA charges to "piggyback" on the timely charges of others and then file an ADEA lawsuit). The Chamber also has filed *amicus curiae* briefs in cases involving procedures and standards under the ADEA and other statutes. *E.g., Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993), *McKennon v. Nashville Banner Pub. Co.*, 63 U.S.L.W. 4104 (U.S. Jan. 24, 1995) (application of the after-acquired evidence doctrine as applied to the ADEA), *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985) (standard for computing double damages under ADEA), and *MCLR Radio Station v. Rengers*, 486 U.S. 1020 (1986) (damages under ADEA).

7. Thus, EEAC and the Chamber have an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of their experience in these matters, EEAC and the Chamber are well situated to brief the Court on the implications of the issues beyond the immediate concerns of the parties to the case.

This brief is timely as it is being filed within the time allowed in Supreme Court Rule 37.2 for filing a brief in support of the petition for writ of certiorari.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council and the Chamber of Commerce of the United States of America respectfully request that the Court grant them leave to file a brief as *amici curiae* in this case in support of Petitioners.

Respectfully submitted,

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council (EEAC) and the Chamber of Commerce of the United States of America respectfully submit this brief *amici curiae*, contingent on the granting of the accompanying motion for leave. The brief supports the petition for writ of certiorari.

INTEREST OF THE *AMICI CURIAE*

The interest of the *amici curiae* is set forth fully in the preceding motion.

STATEMENT OF THE CASE

On January 17, 1992, eleven plaintiffs filed *Grayson v. K Mart*, Civil Action No. 1:92-CV-141-JEC (N.D. Ga.), before District Court Judge Julie Carnes in the Northern District of Georgia. *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1090 (11th Cir. 1996). On October 29, 1992, five different plaintiffs filed *Helton v. K Mart*, Civil Action No. 1:92-CV-2564-MHS (N.D. Ga.), before District Court Judge Marvin Shoob, also in the Northern District of Georgia. *Id.* The plaintiffs in both cases were store managers in K Mart's Southern Region who were demoted or terminated by K Mart between 1990 and 1992. *Id.* They alleged that their demotions or terminations were motivated by age discrimination in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (the ADEA). *Id.*

K Mart's Southern Region covers approximately 700 stores in eighteen states, Puerto Rico, and the Virgin Islands. *Id.* at 1091. It is subdivided into five sub-regions, each of which is headed by a regional manager. *Id.* Each sub-region is divided into districts of about ten to sixteen stores, and each district has its own district manager. *Id.*

Each of the *Helton* plaintiffs worked in a different store and reported to a different district manager. Pet. App. at 6. Three of them worked in Florida and reported to a different regional manager than the other two, who worked in Georgia. *Id.* The eleven *Grayson* plaintiffs worked in K Mart stores in Alabama, Florida, Georgia and North Carolina. *Id.*

After completion of discovery, Judge Carnes ruled that the claims of the eleven plaintiffs in *Grayson* were not properly joined under Fed. R. Civ. P. 20

and should be severed for separate proceedings in accordance with Fed. R. Civ. P. 42(b). *Grayson v. K Mart Corp.*, 849 F. Supp. 785 (N.D. Ga. 1994); Pet. App. at 4. Subsequently, Judge Shoob granted motions converting the *Helton* case into an opt-in class under 29 U.S.C. § 216(b) and allowing the plaintiffs to amend their complaint to specify that their action was being brought on behalf of both the named plaintiffs and others "similarly situated.". 79 F.3d at 1092. All of the *Grayson* plaintiffs then opted-in to the *Helton* case. *Id.*

Upon the interlocutory appeal of Judge Shoob's "class action" ruling, the Eleventh Circuit held that the plaintiffs met the "similarly situated" requirement of § 216(b).[1] *Id.* at 1095. In so holding, the court declared that the "similarly situated" requirement is "considerably less stringent than the requirement [for a class action under Rule 23(b)(3), Fed. R. Civ. P.] that common questions 'predominate' or . . . the [requirement for joinder under Rule 20(a) Fed. R. Civ. P.] that the claims arise out of the same action or occurrence.'" *Id.* at 1096. The Eleventh Circuit subsequently denied K Mart's Petition for Rehearing and Suggestion of Rehearing en Banc.

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[1] Section 216(b) provides, in part:

> An action to recover the liability prescribed . . . may be maintained against any employer in any Federal or State court of competent jurisdiction against by any one or more employees for and in behalf of himself or themselves and *other employees similarly situated.* No employees shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which the action is brought....

29 U.S.C. § 216(b) (emphasis added).

Pet. App. at 6. K Mart then filed the instant petition for a writ of certiorari.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The issue raised by the petition is whether the ADEA's opt-in "representative action" procedure will be available as a matter of right virtually any time plaintiffs allege that an employer has engaged in a pattern of age discrimination when implementing performance-based demotions or workforce reductions. The availability of the representative action procedure turns on whether the plaintiffs are "similarly situated" within the meaning of Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), which is incorporated into the ADEA by Section 7(b), 29 U.S.C. § 626(b). In dispute is the meaning of the phrase "similarly situated."

The Eleventh Circuit declared that "the 'similarly situated' requirement of § 216(b) is more elastic and less stringent than the requirements found in Rule 20 (joinder) and Rule 42 (severance)" and that "a unified policy, plan or scheme of discrimination may not be required to satisfy the more liberal 'similarly situated' requirement of § 216(b)." EEAC and the Chamber submit that this liberalized construction of the Section 216(b) representative class procedure is contrary to decisions of this Court and of other circuits and is contrary to the spirit and meaning of the ADEA. Therefore certiorari should be granted.

REASONS FOR GRANTING THE WRIT

THE ELEVENTH CIRCUIT'S HOLDING THAT THIS AGE DISCRIMINATION CASE SHOULD PROCEED TO TRIAL AS A REPRESENTATIVE ACTION UNDER 29 U.S.C. § 216(b) CONFLICTS WITH THIS COURT'S HOLDING IN *HOFFMAN-LA ROCHE* AND WITH THE DECISIONS OF OTHER CIRCUITS

The central issue raised by the petition is whether the ADEA's opt-in "representative action" procedure will be available as a matter of right virtually any time plaintiffs allege that an employer has engaged in a pattern of age discrimination when implementing performance-based demotions or, as is the case with many large employers, workforce reductions.[2] The availability of the representative action procedure turns on whether the plaintiffs are "similarly situated" within the meaning of Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), which is incorporated into the ADEA by Section 7(b), 29 U.S.C. § 626(b). In dispute is the meaning of the phrase "similarly situated" in the context of cases such as these.

Respondents argue, in effect, that all persons allegedly affected by the same general "pattern of dis-

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[2] It is important to recognize that the procedure in question in this case differs significantly from the Federal Rule of Civil Procedure 23 process used in class actions under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* In Rule 23 actions, individual claimants other than the class representative generally are not even identified until a "stage two" remedial proceeding. In contrast, under the FLSA/ADEA representative action procedure, claimants identify themselves by affirmatively "opting-in" to the suit, and the court must determine, after discovery and before trial on the merits, whether they are "similarly situated" to the plaintiffs who filed the action.

crimination" involving demotions are "similarly situated" for these purposes, regardless of any differences that might exist between their specific circumstances, the nature of their claims, and/or the employer's defenses. The district court in *Grayson v. K Mart*, recognized, in granting severance of the claims of the eleven plaintiffs in that case, that their claims of age discrimination presented "eleven factual situations and eleven sets of witnesses with testimony pertinent to those situations." 849 F. Supp. at 791. Thus, the *Grayson* court determined that: (1) the issues to be tried in the case were too varied to permit a finding that the plaintiffs were similarly situated; and (2) joining the plaintiffs' cases in order to attack performance-based demotions as disparate as K Mart's would promote chaos rather than efficiency. EEAC and the Chamber submit that the district court's decision in *Grayson* comports fully with the intent of the ADEA and with sound public policy.

The *Helton* court and the Eleventh Circuit, however, ignored the plaintiffs' different geographical locations, different worksites, and different supervisors, and instead found the plaintiffs to be "similarly situated." The Eleventh Circuit declared that "the 'similarly situated' requirement of § 216(b) is more elastic and less stringent than the requirements found in Rule 20 (joinder) and Rule 42 (severance)" and that "a unified policy, plan or scheme of discrimination may not be required to satisfy the more liberal 'similarly situated' requirement of § 216(b)." EEAC and the Chamber submit that this liberalized construction of the Section 216(b) representative class procedure is contrary to decisions of this Court and of other circuits and is contrary to the spirit and

meaning of the ADEA. Therefore certiorari should be granted.

I. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS HOLDING THAT THE ADEA'S "OPT-IN" CLASS ACTION PROCEDURE IS APPROPRIATE FOR USE ONLY WHEN THE PLAINTIFFS' CLAIMS ARISE FROM THE "SAME ALLEGED DISCRIMINATORY ACTIVITY" AND USE OF THAT PROCEDURE WOULD PROMOTE "EFFICIENT RESOLUTION" OF THE CASE

Neither the ADEA nor the FLSA defines the phrase "similarly situated" in the context of cases such as these. In *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165 (1989), however, this Court observed that the purpose of the representative action procedure is to promote "*efficient* resolution in one proceeding of common issues of law and fact arising from *the same alleged discriminatory activity*." *Id.* at 173 (emphasis added). Justice Scalia, in a dissenting opinion in which Chief Justice Rehnquist joined, observed further that it is the district court's "duty" to determine whether the would-be plaintiffs are "*in fact* 'similarly situated' " before permitting a case to proceed as a representative action. *Id.* at 177. Thus, this Court already has indicated that, in determining whether prospective plaintiffs are "similarly situated" enough to warrant use of the representative action procedure, the district court must look to the specific employment actions or "activities" that are the basis for the plaintiffs' claims and determine how similar they are in fact.

At issue in this case is whether individuals whose only common attributes are that they are 40 years of age or older and were demoted or terminated from

positions as managers in K Mart stores scattered across various southern states, are sufficiently "similarly situated" to warrant use of the § 216(b) class action procedure. The plaintiffs may meet this burden only by making "substantial allegations that the putative class members were together the victims of a single decision, policy or plan infected by discrimination." *Sperling v. Hoffmann-La Roche, Inc.*, 118 F.R.D. 392, 407 (D.N.J. 1988) *aff'd*, 862 F.2d 439, *aff'd*, 493 U.S. 165 (1989). When plaintiffs are challenging the *same* employment decision, practice, policy, or other activity, then it may be efficient to try their claims collectively, rather than separately. But if the plaintiffs' claims grow out of *different* employment actions or "activities," they are not "similarly situated" and a collective trial is not likely to be an efficient way to proceed, even if there are some common issues of law or fact involved.

It is particularly appropriate in the context of a reduction-in-force or a performance-based demotion for a court to consider the details of the prospective plaintiffs' individual claims, insofar as they have been revealed through discovery, in determining whether or not the plaintiffs are "similarly situated." The selection of individuals to be terminated during workforce reductions or demoted during performance-based evaluations typically involves individualized decisions by separate managers and supervisors. Even where a corporation has established general procedures or guidelines to be used by its supervisors in implementing workforce reductions, it usually is the implementation of those procedures in particular instances that is alleged to be discriminatory, rather than any corporate-wide decision or policy applied in rote fashion to a whole class or cate-

gory of employees.[8] In such circumstances, it cannot properly be said that all individual discrimantion claims growing out of a reduction in force arise from the "same alleged discriminatory activity." *Sperling*, 493 U.S. at 170.

II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER COURTS BECAUSE IT IMPROPERLY IDENTIFIED AND APPLIED THE FACTORS RELEVANT TO DETERMINING WHETHER PROSPECTIVE PLAINTIFFS ARE "SIMILARLY SITUATED" WITH RESPECT TO THE ISSUES RAISED BY AGE DISCRIMINATION CLAIMS IN THE CONTEXT OF LARGE-SCALE CORPORATE PERFORMANCE-BASED DEMOTIONS

Several federal courts have interpreted and applied the "similarly situated" standard of 29 U.S.C. § 216(b). In doing so, courts prior to the Eleventh Circuit's decision in this case consistently focused not just on the plaintiffs' claims, but on the entire range of issues that would have to be litigated in the case if the representative action procedure were used at trial, including issues raised by the employer's defenses. *See Mooney v. Arabian Am. Oil Company*, 54 F.3d at 1214 (5th Cir. 1995) (plaintiffs were not similarly situated because they had vastly disparate employment situations, they were employed in at

[8] Collective litigation of age discrimination claims growing out of workforce reductions and demotions, therefore, is likely to be far more complex than, for example, litigation of the typical FLSA claims for which the representative action procedure was originally designed. In FLSA class actions, the challenged action typically is a substandard pay rate or an improper overtime practice that may have been applied across-the-board in a rote manner to a whole class or category of employees.

least 93 different departments, and they had different job tenure, employment history, salary grade, qualifications, and education); *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987), *appeal dismissed, mandamus granted in part, sub nom. Lusardi v. Lechner*, 855 F.2d 1062 (3d Cir.), *decertification adhered to after mandamus*, 122 F.R.D. 463 (D.N.J. 1988), *claim dismissed*, 58 Fair Empl. Prac. Cas. (BNA) 1049 (D.N.J. 1991), *aff'd*, 975 F.2d 964 (3d Cir. 1992) (decertification of class of plaintiffs in ADEA case necessary where members of proposed class came from different departments, groups, organizations, suborganizations, units, and local offices, performed different jobs at different geographic locations, were subject to different job actions concerning reductions in work force which occurred at various times as result of decisions by different supervisors made on a decentralized employee-by-employee basis); *Ulvin v. Northwestern Nat'l Life Ins. Co.*, 141 F.R.D. 130 (D. Minn.), *aff'd on other grounds*, 943 F.2d 862 (8th Cir. 1991), *cert. denied*, 112 U.S. 970 (1992) (decertification of class in ADEA action required where employees varied significantly as to age, year of discharge, type of discharge, division in which they worked, offices in which they worked, supervisors and salaries). In one recent case, the U.S. District Court for the Northern District of Texas observed:

> What is seen here is 'a monster that no one can deal with, made with a lot of individual people with specific grievances.' There is no single, company-wide action but, rather, layoffs by various supervisors of persons, on an employee by employee basis, of widely disparate ages, salaries, and positions over a two year period of time. The factual and/or employment setting of each person's layoff is different, many vary-

> ing questions of law are raised, and the defenses posited are individual to each or small groups of those persons. And while this action alleges that the putative class was adversely affected by a pattern or practice of discriminatory treatment, no such pattern or practice is the least bit evident. Indeed, the only common thread seen here is that the persons involved were forty years old or older and were laid off by MCII. That is clearly not enough.

EEOC v. MCI Int'l, 829 F. Supp. 1438, 1446 (D.N.J. 1993).

As this Court has recognized, the purpose of the representative action procedure in the scheme of the ADEA is to promote efficiency in the trial of ADEA issues. *Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. at 170. A court cannot make a reasoned judgment that the representative action procedure will enhance efficiency in the trial of a case by looking myopically only at whether there is some common thread running through the plaintiffs' claims, such as generalized assertions that age discrimination occurred during a performance-based demotion or a reduction in force. Rather, the court must consider the whole gamut of issues expected to be litigated at the trial. Only then can the court reasonably determine whether the plaintiffs are, in fact, similarly situated with respect to the issues to be litigated. Likewise, only by looking at the full set of issues expected to be litigated can the court determine whether the representative action procedure will promote efficiency in the handling of the case.

The Eleventh Circuit neglected to consider these factors when rendering its decision. The district court in *Grayson*, however, did take these factors into

account in making the decision to separate the eleven plaintiffs' cases. The district court concluded that joining the plaintiffs eleven separate cases "[e]ssentially constitutes eleven mini-trials at once and that, even if the plaintiffs' cases were properly joined, the extreme prejudice defendants would suffer from a joint trial warrants severance." *Grayson*, 849 F. Supp. at 789. As for judicial economy,

> The Court finds plaintiffs' argument regarding judicial economy unpersuasive. Plaintiffs completely ignore the complexities of conducting a trial which involves eleven largely unrelated events. While the logistical inefficiency of conducting such a trial may not completely offset the inefficiency of having repeated presentation of evidence, the Court concludes, given the other factors which weigh so heavily in favor of separation, that concerns about judicial efficiency do not preclude separation.

Id. at 790-91.

The factors examined in *Mooney*, *MCI*, *Lusardi*, and other cases cited above provide a sound, logical basis for determining whether prospective claimants are "similarly situated" with respect to the issues likely to be litigated in a case involving age-based claims in the context of large-scale workforce reductions. At the heart of the courts' inquiries in all of these cases has been whether there was a single company-wide action, or a number of separate termination decisions made on a decentralized basis. *See MCI Int'l*, 829 F. Supp. at 1446; *Lusardi*, 118 F.R.D. at 361. The courts in *Lusardi*, *MCI*, and the district court in *Grayson* approached that decision by examining *both* the evidence proffered by the plaintiffs in an attempt to establish a centrally-orchestrated pattern

or program of discrimination *and* the facts revealing how the workforce reductions (and performance-based demotions) in question were actually implemented.

Factors not considered by the Eleventh Circuit include the number of individuals adversely affected, the number of different locations, the divisions in which those individuals worked, and the number of managers involved in making the decision. Also not considered was the degree of diversity in the nature of the plaintiffs' claims. These factors all bear a direct relationship to the efficiency or inefficiency of trying the plaintiffs' claims collectively, and thus are germane when the representative action procedure has been requested. Unfortunately, the Eleventh Circuit erroneously ignored those factors.

Finally, the Eleventh Circuit also should have considered the employer's defenses, as well as the plaintiffs' allegations, in determining whether or not would-be ADEA plaintiffs were "similarly situated" and whether their claims would be appropriate for trial on a collective basis. Due process requires that an employer faced with multiple claims of age discrimination be afforded the opportunity to present any defenses it has to each such claim at the liability stage of the trial. *Lusardi*, 118 F.R.D. at 361. *Cf. Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (Due process requires that defendants be provided opportunity to present their defenses "at a meaningful time and in a meaningful manner").

Thus, the defendant-employer in an ADEA case must be afforded the opportunity to present any legitimate business explanation it may have for each of its challenged employment decisions to the jury

that will decide its liability. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *Burns v. Texas City Refining*, 890 F.2d 747, 749-50 (5th Cir. 1989). Moreover, the ADEA expressly provides that an employer may not be held liable if it can show that an employment action was based on "a bona fide occupational qualification" (BFOQ), a "reasonable factor other than age" (RFOA), or a "bona fide seniority system," or that the action was necessary to comply with the laws of the country in which the workplace was located. 29 U.S.C. § 623(f)(1). Nor may the employer be held liable under the ADEA if its action was taken to observe the terms of a bona fide employee benefit plan meeting the requirements of 29 U.S.C. § 623(f)(2)(B) or if it discharged or otherwise disciplined an individual for "good cause." 29 U.S.C. § 623(f)(3).

To be meaningful, then, the employer's opportunity to present any such defenses with respect to alleged instances of age discrimination must be provided in the context of the same proceeding in which the plaintiffs present their prima facie claims, meriting separate trials when the facts and circumstances surrounding the case differ.

Such defenses, however, typically are highly individualized with respect to each person terminated or demoted. Accordingly, combining a multitude of separate terminations and demotions at a multitude of separate facilities of the same employer into a single lawsuit makes for a highly inefficient, unwieldy action.

III. IF AFFIRMED, THE ELEVENTH CIRCUIT'S DECISION WILL DEFEAT THE PURPOSE OF THE REPRESENTATIVE ACTION PROCEDURE IN SECTION 216(b) CONTRARY TO THE RULING OF THIS COURT IN *HOFFMAN-LA ROCHE*

Because the recognized purpose of § 216(b)'s representative action procedure is to promote efficiency in the trial of ADEA cases arising from "the same alleged discriminatory activity," *Sperling*, 493 U.S. at 170, it is imperative that the lower courts take "fairness and procedural considerations" into account in deciding whether the use of the representative class procedure will be appropriate in the circumstances of a particular case. The instant litigation will become unwieldy and inefficient if a court attempts to try all of the claims of discrimination involved before a single jury in one huge, protracted trial.

The district court in *Lusardi* aptly characterized such a collective proceeding as "a monster that no one can deal with, made up with a lot of individual people with specific grievances." 118 F.R.D. at 361, *quoted in MCI Int'l*, 829 F. Supp. at 1446. Clearly, a collective trial in this case will likewise be a "monster." For, the claims of the various terminated and demoted managers from K Mart's vast Southern Region, and the potential defenses K Mart may have against them, are sufficiently diverse to consume months of trial and thoroughly confuse any jury. The court in *Grayson* noted as much when it discussed the inappropriateness of conducting eleven "mini-trials" and the extreme prejudice the defendant would suffer from a such collective trial. *Grayson*, 849 F. Supp. at 789.

By ignoring these practicalities and liberalizing the requirements for use of the ADEA § 216(b) proce-

dure, the decision in this case invites expanded use of that procedure that will be unfair to employers and burdensome to the courts. That result would conflict with decisions of this and other circuits and with the intent of the ADEA. Accordingly, the petition for writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, the *amici curiae*, EEAC and the Chamber, respectfully request that the Court grant certiorari in this case.

Respectfully submitted,

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